

# **GUIDE TO ADMINISTRATIVE APPEALS PROCESS FOR DENIALS OF MWBE CERTIFICATION**

## **About This Guide**

This guide was written to help businesses that apply for and are denied certification as a minority or women-owned business enterprise (“MWBE”) understand the administrative appeals procedure used by the New York State Department of Economic Development, Division of Minority and Women’s Business Development (“DED” or the “Division”). It explains the administrative appeals process for a business that has been denied MWBE certification. While this guide may be helpful to understand the administrative appeals process, it is not a substitute for the rules governing appeals. Businesses are urged to consult the regulations that govern the MWBE program as well as New York State Executive Law Article 15-A(both available [here](#)) for more precise and current information. This guide is not a substitute for consultation with an attorney.

### **1. What is an administrative appeal?**

An administrative appeal is a legal proceeding conducted via a virtual hearing<sup>1</sup> or written appeal submission, to challenge a determination made by the Division to deny MWBE certification. The Division will review a business’ certification or recertification application and subsequently provide written notice as to whether the application has been approved or denied certification status, based on the documents and information provided as well as any site visit or interview done. Written notice of the Division’s determination to deny certification status may be referred to as a “denial letter” or “denial determination.” If a business enterprise receives a denial determination, such business (“Applicant”) may request an administrative appeal.

### **2. What is a virtual hearing? What is a written appeal?**

A virtual hearing is a proceeding in which the Applicant (as well as DED) provides evidence and arguments in support of its position through oral argument and testimony. The virtual hearing takes place before an independent Administrative Law Judge (“ALJ”), using the Webex or Zoom videoconferencing platform.

Alternatively, and in lieu of a virtual hearing, an Applicant may appeal in writing. In such an instance, the Applicant would submit a written submission containing evidence and arguments in support of its position. An Applicant’s written submission is submitted to an ALJ and following that submission, DED will submit a written response.

### **3. How are these administrative appeals conducted?**

Administrative appeals are conducted in accordance with NYS Executive Law, Article 15-A, the related Regulations (5 NYCRR Part 145), and the New York State Administrative Procedures Act.

### **4. Who conducts the administrative appeal?**

Administrative proceedings concerning denial determinations are conducted by an ALJ. The ALJ is an independent officer appointed by the Director of the Division to hear appeals of determinations denying certification. During a virtual hearing, the ALJ will preside over the hearing. On a written appeal, all written submissions will be provided to the ALJ. Following the virtual hearing or submission of the parties’ written appeal documents, the ALJ will issue a Recommended Order to the Director of the

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<sup>1</sup> Due to the COVID-19 pandemic, in-person hearings are not being held live but instead, are currently being conducted virtually using videoconferencing, which requires that the parties have a fast, reliable internet connection and computer enabled with audio/video capabilities.

Division. Following receipt of the Recommended Order, the Director of the Division will render a Final Order, which may affirm, reject or modify such Recommended Order.

**5. Who participates in administrative appeals?**

Usually, the participants (or “parties”) in the administrative appeal are the Applicant who has been denied certification and, if represented, its counsel, as well as DED staff. DED is represented by an attorney. The Applicant may also be referred to as the “Appellant”. Both parties present their positions to an ALJ at a virtual hearing or through written submissions. Typically, the parties support their positions by presenting relevant witness testimony or by introducing documentary evidence.

**6. How is an administrative appeal initiated?**

An Applicant who has been denied MWBE certification may administratively appeal the determination by submitting a Request to Appeal (also referred to as a Notice of Appeal) to DED within 30 days of receiving the denial letter. To request an appeal, Applicants must complete the Request to Appeal form and must specify whether the Applicant seeks to proceed with a virtual hearing or alternatively, seeks to proceed via written submission. The Applicant may also provide a brief statement concerning the bases of appeal and identify any documents that it anticipates relying on, in support of its appeal. The denial letter describes the procedures for requesting an appeal.

The Request to Appeal form can be found [here](#).

**7. What happens after an Applicant submits a Request to Appeal?**

Following an Applicant’s timely request to appeal, if a party seeks to proceed via a virtual hearing, the party will be contacted by DED to schedule a hearing date when a hearing date becomes available and will be issued a Notice of Hearing.

Alternatively, if a party seeks to submit a written appeal, DED will subsequently issue a Notice of Written Appeal, which contains information on how the party should submit its written appeal submission. Completed written appeal submissions and any exhibits thereto, are due from the Applicant within 60 days of the Applicant’s receipt of the denial letter. Copies must be sent to both the ALJ and Counsel for DED.

**8. How are administrative appeals processed?**

Administrative appeals are generally processed in the order they are received. Virtual hearings are scheduled when a virtual hearing date becomes available and an Applicant will be contacted only at that time for scheduling purposes. Similarly, DED responds to written appeal submissions in the order they are received. When DED submits its written response to the ALJ, the Applicant will at that time receive a copy as well.

**9. What if the Applicant wants the virtual hearing date changed or an extension of time to submit its written appeal submission?**

The Applicant may submit a request to the ALJ assigned to its case at least seven (7) days prior to the scheduled date of the virtual hearing or date by which the written appeal submission is due. The ALJ has discretion to change the virtual hearing date or deadline for the completed written submission, based

upon a showing of good cause. Requests for adjournments of virtual hearings, once scheduled, are discouraged.

**10. How do the parties present their positions to the ALJ at a virtual hearing?**

The parties present their positions primarily through the testimony of witnesses. All witnesses are sworn under oath by the ALJ. Parties may also present and support their case by offering documents into evidence. These documents offered by the Parties are called “exhibits.” The Applicant will have the opportunity to present its case through direct examination or statements of its own witnesses as well as the opportunity to cross-examine DED’s witnesses. Similarly, DED may cross-examine the Applicant’s witnesses as well as present testimony from its own witness.

For virtual hearings concerning the denial of MWBE certification, the Applicant’s presentation of evidence is limited to such relevant documentation that was before the Division at the time of the review of the application and denial determination. Evidence that seeks to clarify or explain previously submitted materials shall be considered under Scherzi Systems, LLC v. White, 197 A.D.3d 1466 (3d Dept 2021)

**11. Can the Applicant submit documents at the virtual hearing that it did not submit to the Division with its application for MWBE certification or recertification?**

Yes, but only if the document seeks to clarify or explain previously submitted materials.

**12. How do the parties present their positions to the ALJ in a written appeal?**

The parties present their positions through written submissions which explain their reasoning. Written appeal submissions may include written argumentation, witness statements, or affidavits, as well as reference to or reliance on exhibits. The Applicant must provide their written appeal submission to the ALJ first. DED will subsequently submit its written submission in response.

For written appeal submissions concerning the denial of MWBE certification, the Applicant’s presentation of evidence is limited to such relevant documentation that was before the Division at the time of the review of the application and denial determination. Evidence that seeks to clarify or explain previously submitted materials shall be considered under Scherzi Systems, LLC v. White, 197 A.D.3d 1466 (3d Dept 2021)

**13. Can the Applicant submit documents in its written appeal that it did not submit to the Division with its application for MWBE certification or recertification?**

Yes, but only if the document seeks to clarify or explain previously submitted materials.

**14. Can the Applicant request a copy of its application?**

Yes. The Applicant may make a written request for a copy of its application for certification as well as documents it submitted in support of its application. The documents to be requested or discovered are limited to those which, as of the date of the discovery request, the Division had in its possession and which were before the Division at the time of denial. Any such request should be sent to the following address as well as the assigned Administrative Law Judge and should include the Applicant’s contact information and email address:

Counsel’s Office  
ATTN: MWBE Appeals Unit

**15. How are documents submitted at the virtual hearing?**

Copies of documents offered at the virtual hearing must be made available to the other party by the party offering the documents as evidence. In most instances, the Applicant will already have seen the material offered by the DED attorney or already have copies of it. The Applicant will need to supply both electronic and hard copy sets of its material to the ALJ and the DED attorney in advance of the virtual hearing, in accordance with the schedule set forth by the ALJ. The applicant should have available a copy of its documents for its own use as well.

**16. What does the ALJ review to make his/her decision?**

The ALJ reviews information, documents and testimony presented by the parties at the virtual hearing or in the written submissions. This is referred to as the “appeal record.” For virtual hearings, the appeal record is typically deemed complete at the conclusion of the virtual hearing and includes an audio recording of the proceeding. For written appeals, the appeal record is typically deemed complete following the Applicant’s written appeal submission and DED’s responsive written submission.

**17. If the Applicant does not have an attorney, will the ALJ assist the Applicant at the hearing?**

An Applicant is not required to retain an attorney whether proceeding with an appeal by written submission or virtual hearing.

If the Applicant is self-represented, the ALJ may explain the hearing procedure generally to the Applicant but cannot advise it on what to do. The ALJ cannot be an advocate of the Applicant’s position and must remain impartial. Parties make their own decisions about whether they will testify and what evidence they will offer. If a party wants to testify but has no attorney, the ALJ will provide the party with an opportunity to make a statement under oath. The ALJ may also ask questions to clarify what a witness has said.

**18. What should a witness know about testifying?**

Witnesses are sworn in by the ALJ prior to testifying at the virtual hearing. They must tell the truth. If a witness does not understand a question, he or she may ask for clarification. If a party objects to a question, the witness should wait for the ALJ’s ruling before answering. Finally, witnesses should always speak loudly, slowly and clearly, as a record is being made of their testimony.

**19. How does the ALJ control the hearing?**

ALJs have broad authority to maintain virtual hearing order and efficiency. The ALJ controls the virtual hearing by ruling on any requests made by the parties. For instance, one party may object to certain evidence as irrelevant to the hearing issues. If the ALJ sustains the objection, the evidence is excluded from the hearing record. If the ALJ overrules the objection, the evidence is admitted.

**20. What is the standard of proof?**

In an administrative appeal, the Applicant bears the burden of proving that the Division’s denial of the Applicant’s MWBE certification is not supported by substantial evidence. *See* State Administrative Procedure Act § 306[1]. The substantial evidence standard requires only that a given inference is reasonable and plausible but not necessarily the most probable. *See, e.g., Matter of Ridge Rd. Fire Dist. v. Schiano*, 16 NY3d 494, 499 (2011) (internal quotation marks and citations omitted).

**21. How is a Recommended Order made?**

Following the closing of the appeal record and the completion of his/her review of the parties' arguments and evidence, the ALJ will render a Recommended Order. The Recommended Order sets forth in writing the ALJ's recommendation to the Director of the Division to affirm, reject or modify the denial determination as well as the ALJ's findings and reasons for his/her recommendation. A Recommended Order generally includes an introductory statement, a statement of issues, findings of fact, the ALJ's reasons for the decision, and recommendation.

The ALJ will submit a Recommended Order to the Director of the Division within 60 days of the closing of the appeal record.

**22. What is a Final Order?**

The Director of the Division will issue a Final Order that accepts, rejects, or modifies the Recommended Order within 30 days of receipt of the Recommended Order.

**23. Can an Applicant withdraw its administrative appeal following the ALJ's issuance of the Recommended Order?**

No, an Applicant cannot withdraw its administrative appeal following the Recommended Order even if the withdrawal is prior to the Director of the Division issuing a Final Order. The appeal can only be withdrawn prior to the issuance of the Recommended Order.

**24. Can the Final Order be appealed?**

Yes. The Final Order may be appealed to the State courts pursuant to Article 78 of the Civil Practice Law and Rules.

**25. Are Recommended Orders and Final Orders issued in response to other appeals publicly available?**

Recommended Orders and Final Orders of prior administrative appeals may be accessed at <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-appeal-hearings>.

**26. Even though the Applicant did not win on its administrative appeal, can it re-apply for certification?**

An Applicant may not reapply for certification for two (2) years from the date of a final determination in the administrative appeal and/or judicial order, whichever is later.

*Please note that this guide may be revised or amended from time to time and without notice.*

*Additional questions may be directed to the MWBE Appeals Unit at Empire State Development's Albany office, 518-292-5100. Please note that questions or issues regarding the grounds for denial of certification can only be addressed at the appeal hearing or in the form of a written appeal.*

*General questions concerning an applicant's certification application should be directed to the MWBE Help Desk at: 212-803-2414 or 855-373-4692. An applicant may also send an email to: [MWBEcertification@esd.ny.gov](mailto:MWBEcertification@esd.ny.gov)*

